STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 12, 2003
v	No. 238998 Oakland Circuit Court
TRAYON QUANTAY SAMUEL, Defendant-Appellant.	LC No. 2001-177980-FH

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver between 225 and 650 grams of cocaine, MCL 333.7401(2)(a)(ii), possession with intent to deliver between 50 and 225 grams of cocaine, MCL 333.7401(2)(a)(iii), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was consecutively sentenced to twenty to thirty years' imprisonment for the possession with intent to deliver between 225 and 650 grams of cocaine conviction, ten to twenty years' imprisonment for the possession with intent to deliver between 50 and 225 grams of cocaine conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that he was denied the effective assistance of counsel. We disagree. To establish a denial of effective assistance of counsel, a defendant must prove that his counsel's performance was deficient and that, under an objective standard of reasonableness, defendant was denied his Sixth Amendment right to counsel. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). The deficiency must be prejudicial to defendant to the extent that, but for counsel's error, the result of the proceedings would have been different. *Id*. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). This Court will not second guess counsel's trial tactics. *Id*.; *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000).

First, defendant argues that he was prejudiced because defense counsel filed an untimely motion to suppress the evidence which resulted in a cursory evidentiary hearing and the trial court admonishing defense counsel for mismanaging the case. However, review of the record reveals that a thorough and impartial hearing was held by the trial court. See *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). Second, defendant argues that the two cocaine offenses were so unrelated that his counsel should have filed a motion for severance. However, a

motion for severance would have been fruitless because defendant's charges were sufficiently related as a part of a single plan or scheme. See MCR 6.120(C); *People v Tobey*, 401 Mich 141, 151-152; 257 NW2d 537 (1977).

Next, defendant argues that defense counsel failed to put forth any defense "whatsoever." However, defense counsel advanced a theory that defendant was only a "mule," a carrier of drugs, and the narcotics could have been accessed by defendant's older brother as he was seen and stopped outside the Marshall home after defendant was arrested. Additionally, defense counsel aggressively cross-examined the police officers to subject the prosecution's case to meaningful adversarial testing. We will not second guess defense counsel's trial strategy. See *Williams*, *supra*; *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant also argues that the jury should have received an instruction that the prosecution had to establish that knowledge of the amount of cocaine was an element of the two possession offenses for which defendant was charged. Defendant relies on *Apprendi v New Jersey*, 530 US 466, 476; 120 S Ct 2348; 147 L Ed 2d 435 (2000) and *People v Mass*, 464 Mich 615; 628 NW2d 540 (2001) in support of his claim. However, this Court rejected the same argument in *People v Marion*, 250 Mich App 446, 450-451; 647 NW2d 521 (2002); accordingly, the trial court's instructions were proper.

Finally, defendant claims that his counsel was ineffective because he did not file a written response to the prosecution's sentencing memorandum. However, at the sentencing hearing defense counsel reviewed the presentence report, objected to erroneous information within the report, and aggressively argued that substantial and compelling reasons existed for departure from the statutory minimum. Therefore, we conclude that defendant was not denied the effective assistance of counsel at sentencing. See *People v Russell*, 254 Mich App 11, 18; 656 NW2d 817 (2002); *Garza*, *supra*.

Next, defendant argues that the trial court erred in denying his motion to suppress. This Court reviews the trial court's underlying factual findings on a motion to suppress evidence for clear error. *People v Oliver*, 464 Mich 184, 191; 627 NW2d 297 (2001). A ruling is clearly erroneous where the reviewing court is firmly convinced that a mistake has been made. *People v Brzezinski*, 243 Mich App 431, 433; 622 NW2d 528 (2000). This Court reviews de novo a trial court's ultimate decision on a motion to suppress. *People v Beuschlein*, 245 Mich App 744, 748; 630 NW2d 921 (2001).

Defendant first argues that the stop of the vehicle he was driving was unlawful because even if the police stopped him for a traffic violation, it was a pretext as evidenced by the facts that he was never asked to produce his drivers license, registration or insurance, and no citation for a traffic offense was issued. We disagree. Under *Terry* and its progeny, the police may conduct an investigatory stop where they have a reasonably articulable suspicion that a crime is afoot or has been committed. *Terry v Ohio*, 392 US 1, 21-22, 30-31; 88 S Ct 1868; 20 L Ed 2d 889 (1968). Here, defendant never disputed that he committed a traffic violation. As such, probable cause was established to justify the stop of defendant's vehicle and to support an investigatory stop. See *People v Marcus Davis*, 250 Mich App 357, 363; 649 NW2d 94 (2002).

Further, the police lawfully stopped the vehicle because they had a reasonably articulable suspicion that defendant was transporting cocaine. An investigatory stop of a vehicle may be

based on an anonymous tip if, under the totality of the circumstances, there are sufficient indicia of reliability to support a reasonable suspicion of criminal activity. *People v Faucett*, 442 Mich 153, 168-169; 499 NW2d 764 (1993). "Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause." *People v Custer*, 465 Mich 319, 328; 630 NW2d 870 (2001), quoting *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996). Defendant's reliance on *Florida v JL*, 529 US 266, 272; 120 S Ct 1375; 146 L Ed 2d 254 (2000), is misplaced because the facts that undermined the reliability of the tip in *JL* are absent in the instant case. Here, the tip came from a "confidential" informant who was known to the police. Further, the tip included information regarding the approximate time frame that defendant would leave, identified the address of the originating point, identified the general area that defendant was driving towards (which was consistent with the direction that defendant was heading when he was stopped), and described defendant's physical characteristics, as well as the make of the vehicle he was driving. Lastly, unlike *JL*, the police were able to corroborate the home address with information in the police computer.

Defendant also argues that, under the totality of the circumstances, there was no justification for the patdown because the informant did not provide any information that he was armed and, further, the patdown exceeded the scope of a *Terry* stop for a traffic violation. Again we disagree. "The Fourth Amendment of the United States Constitution and the analogous provision in Michigan's Constitution guarantee the right of the people to be free from unreasonable searches and seizures." *Champion*, *supra* at 97, citing US Const, Am IV; Const 1963, art 1, § 11. A search or seizure conducted without a warrant is unreasonable unless there exist both probable cause and a circumstance establishing an exception to the warrant requirement. *People v Borchard-Ruhland*, 460 Mich 278, 293-294; 597 NW2d 1 (1999); *People v Lewis*, 251 Mich App 58, 69; 649 NW2d 792 (2002). Stop and frisk searches and a search conducted pursuant to consent are exceptions to the general warrant requirement. *Borchard-Ruhland*, *supra* at 294; *Brzezinski*, *supra*. The scope of a patdown search is limited to that necessary to secure safety. *Champion*, *supra* at 99.

Here, under *Terry*, the police were authorized to perform a limited patdown for contraband that was readily apparent. During the patdown a hard object was felt in defendant's jacket pocket which, combined with the informant's tip and the police's previous contact with defendant in a narcotics operation, gave police probable cause to believe that the object was a weapon. More importantly, during the patdown, the police officer asked for defendant's consent to remove the brown bag. Defendant consented to the removal of the bag and the cocaine was visible from the top of the bag, which resulted in a proper seizure of the cocaine; therefore, the trial court did not err in denying defendant's motion to suppress on this basis. See *Champion*, *supra* at 98-99.

Defendant also argues that there were no exigent circumstances which would permit the police to enter his mother's home and they impermissibly secured the home while waiting for a search warrant that was never issued. Under the exigent circumstances exception, police may not enter a dwelling without probable cause to believe that a crime was recently committed on the premises, and that they will find evidence or the persons who committed the suspected crime. *In re Forfeiture of $176,598*, 443 Mich 261, 271; 505 NW2d 201 (1993). Here, however, the police entered the home with the consent of defendant's brother and, thus, defendant cannot

argue that the police made a warrantless entry into the home. See, e.g., *People v Cooke*, 194 Mich App 534, 536, 539; 487 NW2d 497 (1992). Further, when the police arrived at the home, defendant had already given his consent to search his bedroom and defendant's mother gave her consent to search the home. Therefore, this argument is without merit. See *People v Marsack*, 231 Mich App 364, 378; 586 NW2d 234 (1998).

Next, defendant argues that his sentence was so disproportionate that it constitutes cruel and unusual punishment. However, legislatively mandated minimum sentences are presumptively proportionate. *Marcus Davis*, *supra* at 369. The cumulative length of consecutive sentences need not be considered when determining the proportionality of an individual sentence. *People v Miles*, 454 Mich 90, 95; 559 NW2d 299 (1997); *People v Clark*, 207 Mich App 500, 502; 526 NW2d 357 (1994). Further, defendant concedes that his individual sentences are presumptively valid because the sentences did not exceed the statutory minimums of twenty to thirty years for count one and ten to twenty years for count three. MCL 333.7401(2)(a)(ii); 333.7401(2)(a)(iii). To the extent that defendant claims that his mandatory minimum sentences constitute cruel and unusual punishment, this argument has previously been rejected. See *People v Nunez*, 242 Mich App 610, 618; 619 NW2d 550 (2000).

Next, defendant argues that he was denied due process and equal protection because a person convicted under MCL 333.7401(2)(a)(i) [possession with intent to deliver 650 grams or more of a controlled substance] is allegedly eligible for parole earlier than a person convicted under MCL 333.7401(2)(a)(ii) [possession with intent to deliver between 225 and 649 grams of a controlled substance]. See MCL 791.234(6). Defendant claims, for the first time on appeal, that "[t]he simple concept of fundamental fairness is offended where, as here, had the Appellant been convicted of a greater offense, he would have received a more lenient sentence." However, if defendant had been convicted under MCL 333.7401(2)(a)(i), defendant would not have received a more lenient sentence but could have been sentenced to "imprisonment for life or any term of years but not less than 20 years." To the contrary, under MCL 333.7401(a)(ii) defendant faced a sentence of imprisonment "for not less than 20 years nor more than 30 years." Although under MCL 791.234(6) persons sentenced to life imprisonment *may* be eligible for parole before they have served twenty years of their life sentence, such defendants cannot be said to have "received a more lenient sentence." In any event, the Legislature is the proper forum for such decisions. See *Marcus Davis*, *supra*; *Straus v Governor*, 230 Mich App 222, 225; 583 NW2d 520 (1998); *People v Matthews*, 143 Mich App 45, 64; 371 NW2d 887 (1985).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Brian K. Zahra